COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Proceeding by the Department on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Large Business Customers Served by High-Capacity Loops	)	D.T.E. 03-59

MOTION OF VERIZON MASSACHUSETTS FOR PARTIAL RECONSIDERATION OF ORDER DENYING MOTION FOR RECONSIDERATION OF ORDER CLOSING INVESTIGATION

By order issued in the above proceeding on January 23, 2004 ("the Order"), the Department denied the motion of DSCI Corporation and InfoHighway Communications Corporation ("the CLECs") for partial clarification and reconsideration of the Department's November 24, 2003, *Order Closing Investigation*. In the Order, the Department declined to modify its findings in the *Order Closing Investigation* that the CLECs had not offered proof of facts necessary to support a petition to the Federal Communications Commission ("FCC") to waive its finding that CLECs are not impaired in the absence of unbundled local circuit switching for the enterprise market and that "the Department does not have jurisdiction to enforce unbundling obligations under Section 271 of the Telecommunications Act of 1996." Order at 1-2. Not surprisingly, Verizon Massachusetts ("Verizon MA") agrees with that decision and does not by this motion seek reconsideration of it.

Nevertheless, in footnote nine of the Order, the Department observed in *dictum* that, although local circuit switching for the enterprise market is no longer subject to

compulsory arbitration under Section 252 of the Act, "We do, however, expect Verizon to file the new rates, terms and conditions [for enterprise switching] for approval in a wholesale tariff, because the services are jurisdictionally intrastate common carriage subject to Department approval." This observation was not necessary to the Department's determination of the CLECs' motion. More importantly, it is inconsistent with the Department's findings that Verizon MA's obligation to provide enterprise market switching to CLECs in the future arises solely from Section 271 of the Act, and that the rates, terms and conditions of such services are subject only to enforcement by the FCC, not the Department. Verizon MA has no obligation to file a state tariff which the Department could neither approve nor enforce. Accordingly, Verizon MA respectfully moves the Department to modify the Order by deleting footnote nine. As grounds for this motion, Verizon MA states the following:

The Department correctly found in the Order that "only Section 271(c)(2)(B)(vi) obligates Verizon to provide local circuit switching for high capacity loops." Order at 8. Consequently, only the FCC has authority to enforce that obligation. Section 271(d)(6) gives the FCC sole and exclusive authority to enforce compliance with Section 271 obligations following approval of an application to provide interLATA service. *See Triennial Review Order*, ¶ 665, stating that, "In the event a BOC has already received section 271 authorization, section 271(d)(6) grants the Commission [i.e. the FCC] enforcement authority to ensure that the BOC continues to comply with the market opening requirements of section 271." The Department thus properly held in the *Order Closing Investigation*, at 19, that it "does not have jurisdiction to enforce Verizon's unbundling obligations pursuant to Section 271." *See also,* Order at 8, holding that,

"Nothing in Section 252 gives the Department authority to arbitrate or otherwise formally enforce Verizon's Section 271 obligations." Indeed, the Department even noted in footnote nine of the Order that "Whether those market-based rates [for enterprise switching] continue to meet Verizon's Section 271 obligations, however, is for the FCC to determine."

It would be wholly anomalous for Verizon MA to file a tariff with the Department for services Verizon MA is obligated to provide solely due to federal law and which the *Department does not have jurisdiction to approve or enforce*. Because the Department has no jurisdiction to enforce Verizon MA's obligation to provide enterprise market switching, not only pricing but all terms and conditions of such services are beyond the Department's authority. That authority rests exclusively with the FCC.[1]

The Department notes that tariffing at the state level may be warranted because enterprise switching is an intrastate service. Order, at fn. 9. The Department's observation does not provide cause for requiring that Verizon MA file a state tariff here. Where the Department does not have jurisdiction over a particular service, tariffing is simply unwarranted. For example, in an analogous context, the wholesale generation of electricity may be provided wholly within a state, but the Department does not require that service to be tariffed, because sole jurisdiction over wholesale generation resides with FERC. It is axiomatic that the Department can exercise authority, including imposition of a tariff requirement, only where it has jurisdiction. A contrary conclusion would potentially result in conflict with the FCC, which will determine the scope of

[1] For this reason, the Department would be unable to "make investigation as to the propriety" of a state tariff for enterprise switching, as expected of the Department with respect to all state tariffs under M.G.L. c. 159, §20. This suggests, again, that Section 271 services are not appropriately tariffed at the state level.

Verizon MA's obligations regarding enterprise switching.

For these reasons, the Department should delete footnote nine from the Order. It is in no way pertinent or necessary to the Department's substantive holding of the Order, affirming its statement in the *Order Closing Investigation* that it has no authority to enforce Verizon MA's Section 271 obligations.

Respectfully submitted,

VERIZON MASSACHUSETTS

_____

Bruce P. Beausejour
Victor Del Vecchio
Alexander W. Moore
Linda Ricci
185 Franklin Street – 13th Floor
Boston, Massachusetts 02110
(617) 743-2445

February 12, 2004